FOR ARGUMENT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THUNDER BASIN COAL COMPANY,
Petitioner,
v.

ROBERT B. REICH, as Secretary of Labor; WILLIAM J. TATTERSALL, as Assistant Secretary of Labor For Mine Safety and Health; WILLIAM HOLGATE, as District Manager, Coal Mine Safety and Health Administration of the United States Department of Labor; Mine Safety and Health Administration of the United States Department of Labor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

The Government's argument hinges on three fundamental errors.

First, the Government argues that pre-enforcement review is not available here because Congress channelled all disputes regarding MSHA regulations to the Review Commission. We demonstrate below that this is simply not true. The Congressionally-specified procedures cited by the Government relate solely to an enforcement action initiated by MSHA citation. The Mine Act is silent on the type of review available to aggrieved persons seeking relief from MSHA regulatory decisions approving representatives of miners. The Government's basic argument—that Congress' specification of the method to adjudicate MSHA-initiated *enforcement* proceedings necessarily implies an intent to preclude a mine operator-initiated *pre-enforcement* review of a regulatory decision—cannot be squared with *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), which held that the authorization of review for one type of regulatory action in a statute does not imply a Congressional intent to exclude review for an entirely different type of action. The Government has failed to show a clear Congressional intent to preclude pre-enforcement review here.

Second, the Government errs in asserting that this case is nothing more than a "garden-variety" dispute falling within the mine safety expertise of the Review Commission (R.Br. 15, 28). This case concerns much more than a dispute under the Mine Act, for the heart of the controversy is whether an important right recognized under the federal labor laws for almost 40 years can be obliterated by MSHA's interpretative gloss. The Review Commission's mine safety expertise and fact-finding ability have no bearing on the purely legal question raised by this statutory conflict. But what makes this case clearly beyond any garden-variety characterization is MSHA's coercive

power to assess daily penalties to force Petitioner's abandonment of its labor law right prior to the institution of any administrative hearing. The assessment of daily penalties, in the context of a purely legal issue concerning conduct which poses no present threat to the health or safety of Petitioner's employees, is a fundamentally unfair abuse of the penalty power and certainly beyond "garden-variety" conduct for an enforcing agency of the federal government.

Third, contrary to the Government's scare tactics, allowing pre-enforcement review in this case will not hamper the effective enforcement of the Mine Act, and will not permit routine evasion of MSHA enforcement simply by filing an anticipatory suit. This case falls within a narrow range for pre-enforcement review permitted by the Mine Act and this Court's finality, ripeness and exhaustion doctrines.

I. THE GOVERNMENT HAS FAILED TO ESTABLISH THAT CONGRESS INTENDED TO PRECLUDE PRE-ENFORCEMENT REVIEW.

The Government's entire jurisdictional argument rests on the assertion that the Mine Act contains a "comprehensive" review scheme that "channels" all challenges to MSHA actions to the Review Commission and then the courts of appeals (R.Br. 16-17). From this assumption, the Government argues that this case falls into the general principle that "the review process created by statute for a category of controversies is exclusive and does not permit district courts to exercise jurisdiction over the same controversies" (R.Br. 18). Petitioner does not take issue with this general principle, but it is demonstrably inapplicable here because the Mine Act plainly treats the category of mine-operator challenges to MSHA regulatory action differently from the category of MSHA-initiated enforcement actions, and directs only the latter to the Review Commission.

1. The Mine Act does not specify the method for review of the specific MSHA regulatory decision at issue here. The Act authorizes MSHA to promulgate "regulations" governing the designation of "representative of miners" (30 U.S.C. § 813(f) (1988 & Supp. III 1991)) (hereinafter "Section 813(f) regulations"), but the Act is silent as to the method of direct review for MSHA's Section 813(f) regulatory decisions—here, MSHA's action approving the designation of UMWA organizers, who were not employees of Petitioner, as "representatives of miners" under Section 813(f) ("MSHA's UMWA Designation").[1]

The Government offers no specific statutory authority proscribing pre-enforcement review of MSHA's Section 813(f) regulatory decisions, and no specific provision directing that only the Review Commission can hear challenges to those decisions. Instead, the Government relies on 30 U.S.C. § 815, which on its face only authorizes the Review Commission to hear enforcement actions initiated by MSHA. The Review Commission has consistently viewed its jurisdiction as delimited by this statutory provision and has held that it does not have jurisdiction, in the absence of a pending MSHA enforcement action, to give mine operators even a declaratory ruling on a dispute with MSHA.[2] Thus, neither the Mine Act nor the decisions of the Review Commission support the Government's contention that all controversies regarding MSHA's regulatory decisions concerning "representatives of miners" must be brought to the Review Commission.

The limited jurisdiction of the Review Commission is confirmed by the rest of the Mine Act. The Act does not authorize the Review Commission to review MSHA regulations and guidelines issued under 30 U.S.C. §§ 813(a) and (c) or actions taken or required under 30 U.S.C. §§ 813(b), (e), (h) or (j). Objection to these regulatory decisions is made in district court. *See Society of*

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[1] As discussed *infra* at 15-17, MSHA's UMWA Designation constitutes final agency action applying MSHA's interpretation of its Section 813(f) regulations (30 C.F.R. Part 40) to Petitioner.

[2] *See Kaiser Coal Corp. v. Secretary of Labor*, 10 FMSHRC 1165 (1988), and cases cited by the Government (R.Br. 34 n.21).

Professional Journalists v. Secretary of Labor, 616 F. Supp. 569 (D. Utah 1985), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987); *International Union, UMWA v. Martin*, 785 F. Supp. 1025 (D.D.C. 1992).

Moreover, Congress expressly precluded the Review Commission from any role in the development and determination of the appropriateness of the most important regulations under the Act. In 30 U.S.C. § 811, Congress authorized the Secretary to promulgate "Mandatory Safety and Health Standards" (hereinafter "Section 811(a) regulations") but gave aggrieved persons a limited period for pre-enforcement review of Section 811(a) regulations in the court of appeals with no involvement whatsoever by the Review Commission.[3] The Review Commission is even precluded from reviewing the validity of Section 811(a) regulations when MSHA brings actions before it on citations to enforce these regulations. *See* 30 U.S.C. § 811(d). Thus, the structure of the Mine Act belies the Government's argument that Congress intended to "centralize" all disputes over MSHA regulations in the Review Commission (Br. 22, 23 n.12).

Further, in Section 811(a) Congress clearly distinguished between pre-enforcement challenges to MSHA's regulations and MSHA-initiated enforcement actions. Since Congress codified procedures for pre-enforcement review of Section 811(a) regulations separate from MSHA enforcement actions, there is no basis to the Government's contention that separate pre-enforcement review of MSHA's regulatory decisions under Section 813(f) are precluded merely because Congress specified a forum for adjudicating MSHA citations.[4]

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[3] Recognizing the pre-enforcement nature of this direct review, Congress specified that no court could issue a preliminary injunction restraining enforcement of the mandatory standards during the review of the standards on the merits. 30 U.S.C. § 960.

[4] The special pre-enforcement review limitations on "Mandatory Safety and Health Standards" promulgated pursuant to Section 811(a) are limited to that Section and do not apply to other MSHA regulations, including MSHA's regulations promulgated pursuant to Section 813(f). The presence of an explicit pre-enforcement review procedure for Section 811(a) regulations does not imply that Congress, by its silence, intended that pre-enforcement review is unavailable for Section 813(f) regulations. *Abbott* specifically rejected a similar contention (387 U.S. at 141).

Nor does the Government's reliance (Br. 20) on 30 U.S.C. §§ 818(a) and 820(j), provide any basis for concluding that Congress intended to exclude pre-enforcement review. Both of these sections provide district court jurisdiction for suits brought by MSHA to enforce its orders and to collect civil penalties and are manifestly ancillary to MSHA enforcement actions. They therefore are irrelevant to the issue presented here, once the distinction between pre-enforcement review and enforcement action is recognized.

2. The Government's argument that the Mine Act's scheme for reviewing MSHA enforcement actions inherently precludes pre-enforcement challenges brought by aggrieved mine operators is flatly inconsistent with *Abbott*, which formulated the principles of judicial review of administrative action that continue to guide this Court. *See Reno v. Catholic Social Serv., Inc.*, —— U.S. ——, 61 U.S.L.W. 4652, 4656 (U.S. June 18, 1993). *Abbott* found the presumption for judicial review of agency action required a showing of "clear and convincing evidence" of Congressional intent to withhold pre-enforcement review (387 U.S. at 140 n.2). *Abbott* emphasized that (*id.*):

> The mere failure to provide specifically by statute for judicial review is certainly no evidence of an intent to withhold review.

Further, *Abbott* teaches that the provision for judicial review for one type of regulatory action does not necessarily imply an intent to withhold judicial review for another type (387 U.S. at 141-44).

Abbott clearly governs. In *Abbott*, as here, (1) the statute provided explicit procedures for agency enforce-

ment of its regulations, (2) the statute failed to make any provision for direct review of the regulations prior to agency enforcement actions, and (3) the regulated parties could have raised the same objections to the regulations in opposing the enforcement action as they sought to raise through direct pre-enforcement review.[5] Thus, it is clear from *Abbott* that the fact that the Mine Act contains specific *enforcement* procedures does not in itself create any inference that Congress intended thereby to eliminate pre-enforcement review.

3. The legislative history relied upon by the Government also does not evidence an intent to preclude pre-enforcement review. The Government relies exclusively on the decision by Congress to place the review of MSHA enforcement actions solely in the Review Commission and to eliminate duplicative *de novo* civil penalty actions in the district court (Br. 22-23). These changes, however, concern only the elimination of wasteful duplication and the achievement of improved efficiency in enforcement actions, and do not demonstrate a Congressional intention to otherwise divest district court jurisdiction.[6] Indeed, the precision in the Congressional language eliminating this jurisdiction demonstrates just the opposite—a general Congressional assumption, consistent with *Abbott,* that district courts have general plenary jurisdiction to review agency action unless Congress specifies to the contrary.[7]

Nor does the Government refute the legislative history support for pre-enforcement review referenced in Peti-

[5] In *Abbott*, as here, the ability of regulated parties to obtain meaningful review of the regulatory action in an enforcement proceeding was deemed to be inadequate because of the risk of penalties that would accrue if the agency action were ultimately upheld as lawful. The similar review inadequacy facing Petitioner was set forth in Pet. Br. 39-40 and is addressed at 10-15 *infra.*

[6] Petitioner's opening brief quoted passages from the legislative history explaining that this change was made for reasons wholly unrelated to any intent to restrict access to the general jurisdiction of federal courts (Pet. Br. 23 n.22).

tioner's opening brief. We showed there (Pet. Br. 22-23) that Congress incorporated Coal Act language into the Mine Act with the specific awareness that the language had been construed to permit pre-enforcement review in *Bituminous Coal Operators' Ass'n v. Secretary of Interior,* 547 F.2d 240 (4th Cir. 1977) ("*BCOA*"). The Government argues (Br. 23-24) that the *BCOA* decision was merely the ruling of a single court of appeals and therefore did not constitute "settled law" at the time the Mine Act was passed. The Government's argument is wrong on several grounds.

First, the "settled law" at the time of the passage of the Mine Act was *Abbott,* which plainly held that district courts could hear pre-enforcement challenges to agency action. The *BCOA* decision merely applied the principles of *Abbott* to the Coal Act. *Second, BCOA* was not an obscure appellate decision that was not noticed by Congress when it was re-writing the Coal Act to produce the Mine Act. Instead, the legislative history makes clear that *BCOA* was in the forefront of the legislative vision during the passage of the Mine Act (Pet. Br. 22-23). Moreover, the direct holding of *BCOA* concerns pre-enforcement review; it is not a minor point in the opinion subject to having been overlooked. *Third,* as discussed above, the Mine Act clearly envisioned pre-enforcement review of Section 811(a) regulations—thereby demonstrating a legislative ratification of *Abbott* and *BCOA.* Accordingly, the sole and unpersuasive legislative history argument made by the Government—*i.e.,* the elimination of duplicative and inefficient *de novo* civil penalty trials in district court—hardly qualifies as sufficient support for an affirmative Congressional intent to overrule *BCOA*

[7] Congress clearly knows how to write statutes to exclude or limit pre-enforcement review. When Congress withdraws jurisdiction the Court has taken the terms of the withdrawal on their face and has been loath to expand the exclusion to areas not specified. *See, e.g., Traynor v. Turnage,* 485 U.S. 535 (1988); *McNary v. Haitian Refugee Ctr., Inc.,* 498 U.S. 479 (1991).

sub silentio and preclude pre-enforcement review of MSHA's regulatory decisions under Section 813(f).

4. The Government relies heavily on *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984), to support its argument that Congress intended to preclude district court review. *Block*, however, fully supports Petitioner's position. There, the Court recognized (*id.* at 349) that "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." [8] In contrast, here Congress has not specified any mechanism for review of Section 813(f) regulatory decisions, and there is no evidence elsewhere in the Act or legislative history indicating an intent to preclude pre-enforcement review. These considerations establish, at a minimum, "substantial doubt" as to a legislative intention to preclude pre-enforcement review and therefore require application of the presumption favoring judicial review. *Block*, 467 U.S. at 351.[9]

The remaining cases relied on by the Government stand for the unremarkable proposition that an aggrieved party

[8] In *Block*, the ultimate consumers of milk sought to review a milk marketing order, even though the Agricultural Marketing Agreement Act included review of marketing orders only by "first handlers," who were directly regulated by the Act. Finding from the structure of the Act that Congress intended to permit only first handlers to participate in the formation of marketing orders, the Court concluded that Congress intended to limit the availability of judicial review to first handlers (467 U.S. at 348, 352-53).

[9] In contrast, in *United States v. Erika, Inc.*, 456 U.S. 201 (1982), the failure to provide for judicial review was conspicuous and supported by ample legislative history. In *Erika*, Congress had provided for judicial review of awards under Part A of the Medicare Program, but not for awards under Part B. The Senate Report demonstrated that the silence was deliberate and that review of Part B awards was not desired. Thus, the disparity in the treatment of the two categories of claims, and the specific language in the Senate Report explaining the disparity, demonstrated a clear, affirmative Congressional intent to exclude review.

may not avoid the prescribed statutory procedures for administrative and judicial review. In each case, an aggrieved party sought to initiate review of agency action and failed to comply with a precise statutory scheme permitting, or limiting, that type of review.[10] Significantly, none of those cases addressed the circumstances presented here—where Congress provided a specific method of *enforcement* of agency regulations by agency-initiated proceedings, but Congress was silent on the question of *pre-enforcement review*.[11] On the precise question raised by this case, *Abbott* and its progeny remain the only direct precedent.

II. THE DISTRICT COURT ALSO HAS JURISDICTION OVER PETITIONER'S CLAIMS DUE TO THE INADEQUACY OF MEANINGFUL REVIEW UNDER THE MINE ACT.

Even if all challenges to regulatory decisions under Section 813(f) were required to be presented to the Review Comission, the district court properly exercised jurisdiction of Petitioner's claims in the circumstances of this case. Petitioner's opening brief detailed the Hobson's

[10] *See, e.g., Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) (attempt to circumvent specific procedure applicable to approval of formation of a new bank); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958) (attempted attack in a state court to a Federal Power Commission order where federal court of appeals had exclusive review under statute); *Board of Governors v. MCorp. Fin., Inc.*, —— U.S. ——, 112 S.Ct. 459 (1991) (plain language of the judicial review provisions of the Federal Institutions Supervisory Act deprived the district court of jurisdiction to enjoin the agency's proceedings).

[11] *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), and *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), do not deal with pre-enforcement review of a final regulatory decision, but rather concern challenges to the agency's determination that probable cause exists to bring an enforcement action—an issue that is bound up in the enforcement proceeding itself. Significantly, the court in *Abbott* discussed *Ewing* and did not find it inconsistent with pre-enforcement review (387 U.S. at 146-48).

choice Petitioner would face upon receiving MSHA's citation for failing to honor MSHA's UMWA Designation (Br. 30-36). In essence, Petitioner could not obtain review of its NLRA-conflict claim before the Review Commission without first refusing to comply with MSHA's UMWA Designation and receiving a citation.[12] Once this enforcement process has begun, however, Petitioner will be pressured into relinquishing its NLRA right because the Mine Act requires prompt abatement of violations and payment of penalties, including substantial daily penalties, for failure to abate within the time ordered by MSHA. Further, while abatement of the violation (*i.e.*, Petitioner's abandonment of its NLRA right) during the administrative proceedings would avoid increasing penalties, it would cause Petitioner to suffer irreparable harm during the proceedings because the UMWA would be able to use its enhanced position to bolster its ongoing union organizing activities—an advantage that could not be eliminated even if Petitioner ultimately prevailed on the merits of its statutory conflict claim after months of administrative and court review. In these circumstances, where Petitioner would be deprived a "meaningful" opportunity to obtain effective review of its substantial statutory and constitutional claims, the courts have held that Congress did not intend to deny all effective review, and have found jurisdiction in the district courts for the limited circumstances. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991); *Reno v. Catholic Social Serv., Inc.*, —— U.S. ——, 61 U.S.L.W. 4652 (U.S. June 18, 1993); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Traynor v. Turnage*, 485 U.S. 535 (1988).

The Government offers three main arguments in opposition: (1) the Review Commission is capable of handling these statutory and constitutional claims in the

[12] As noted *supra*, n.2, the Review Commission will not hear disputes prior to initiation of a MSHA enforcement action.

first instance; (2) any alleged coercion from threatened daily penalties is speculative; and (3) Petitioner will not suffer irreparable harm. The Government's arguments do not withstand scrutiny.

1. The Government goes to great length to demonstrate the expertise of the Review Commission in dealing with the Mine Act, and particularly with issues interpreting MSHA regulations (Br. 29-35). These arguments, however, miss the essential point. The issue here arises as a statutory conflict between the Mine Act and the NLRA. The NLRA right at issue has been recognized for almost 40 years as a part of the "accommodation" effected between the organizing rights of employees and employers under the labor laws. *Lechmere, Inc. v. NLRB*, —— U.S. ——, 112 S.Ct. 841 (1992). Although the Review Commission has undoubted expertise in mine safety issues, it has none in the areas of industrial relations and labor law. It should be expected to have difficulty in accommodating NLRA rights because, like other agencies, it has no "special expertise" to assess MSHA regulations in light of statutory considerations outside its "exclusive domain." *Traynor*, 485 U.S. at 544. The Review Commission demonstrated this point in its recent decision on the same legal issue presented here, where in an enforcement context it concluded that a mine operator's NLRA right was inapplicable to Mine Act considerations and referred the mine operator to the NLRB for resolution of its NLRA rights—an inapt solution since the NLRB has no regulatory authority over and no procedure to permit a challenge to MSHA's abrogation of the NLRA right. *Kerr-McGee Coal Corp. v. Secretary of Labor*, 15 FMSHRC 352 (1993) (review pending No. 93-1250, D.C. Cir.). In the circumstance here, where the claim is that the regulatory decision is inconsistent not "with the statute under which it was issued" but with another statute outside the agency's "exclusive domain," the federal courts are more appropriate to "decide whether there is

some fundamental inconsistency" in the agency's determination. *Traynor*, 485 U.S. at 544.[13]

2. The Government suggests that the possibility that MSHA would assess substantial penalties, including maximum daily penalties, against Petitioner was merely "hypothetical" (Br. 37 n.23). The record shows however that the threat of maximum daily penalties was successfully employed against the neighboring Kerr-McGee mine by the same MSHA office just a few months earlier on the identical issue (J.A. 42-43, 47-48).[14] The possibility that MSHA would engage in similar conduct against Petitioner was real and far from "hypothetical." *See Abbott*, 387 U.S. at 152-54 (threat of substantial penalties made agency enforcement proceeding an inadequate substitute for pre-enforcement review).

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[13] The *Kerr-McGee* decision is plainly inconsistent with the requirement imposed in *Traynor* that, in the context of competing statutory interests, it is the "duty of the courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective." 485 U.S. at 547-48 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). In the absence of any clear Congressional intention in the Mine Act to revoke the NLRA right (see Pet. Br. 26), the *Kerr-McGee* decision operates to violate the cardinal rule against "repeals by implication." *Traynor*, 485 U.S. at 547-48.

In this regard, it is significant that in contrast to the Review Commission's decision upholding MSHA's UMWA Designation for the Kerr-McGee mine, the district court in this case, after considering the merits of the statutory conflict claim, granted a permanent injunction on the basis of its finding that MSHA's UMWA Designation for Petitioner's mine exceeded MSHA's statutory authority under the Mine Act as construed in light of the NLRA. *Thunder Basin Coal Co. v. Martin*, No. 91-CV-0050-B (D.Wyo. March 13, 1992).

[14] The Government's effort to minimize the threat to Kerr-McGee (Br. 37 n.24) is belied by the Review Commission's characterization (*Kerr-McGee*, 15 FMSHRC at 355):

> Kerr-McGee finally abated the citation after receiving a letter from the MSHA district manager stating that Kerr-McGee would be assessed a daily penalty . . . if it did not immediately abate the violative condition.

MSHA's letter demanded abatement within 24 hours, and Kerr-McGee capitulated immediately (J.A. 42-44).

The Government also argues that MSHA's assessment of daily penalties is not coercive because the penalties can be minimized by using the Review Commission's expedited procedures, and because MSHA can only propose the penalties, which can then be imposed by the Commission with judicial review (R.Br. 37). The problem with these arguments is that they both depend entirely on Review Commission discretion, which will not be exercised until after MSHA initiates enforcement action. Expedited proceedings are disfavored, often opposed by MSHA, and vested to the sound discretion of the Review Commission ALJ.[15] Similarly, the Review Commission decisions offer little comfort regarding its potential ruling on daily penalties, for its decision in *Kerr-McGee* offered no criticism of MSHA's threat of maximum daily penalties in that case. In short, any mine operator, faced with the possibility of maximum daily penalties mounting during a multi-year enforcement proceeding, would be coerced, as was Kerr-McGee, into relinquishing its NLRA right.[16]

3. The Government and the UMWA as amicus curiae contend that Petitioner will suffer no irreparable harm from honoring the UMWA Designation during the administrative review process because there is no reason to believe that MSHA inspectors would allow non-employee miners' representatives to act outside the scope of their Mine Act responsibilities during an inspection and any individual act of abuse could be dealt with after the fact

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[15] *See, e.g., Secretary of Labor v. Wyoming Fuel Co.*, 14 FMSHRC 1282, 1286-87 (1992); *Medicine Bow Coal Co. v. Secretary of Labor*, 12 FMSHRC 904 (1990).

[16] MSHA's assessment of maximum daily penalties is particularly offensive in the circumstances here, where Petitioner has raised a legitimate legal question of statutory conflict and where the issue sought to be resolved by MSHA poses no present threat to the health or safety of Petitioner's employees. For this reason, the Government is wrong in contending that a claim of alleged inadequacy of Review Commission proceedings would be present in every MSHA enforcement case (R.Br. 38 n.25).

(R.Br. 39 n.26; UMWA Br. 18-19). This contention completely misses the mark, for it is the union's very presence on the premises and the attendant empowerment adhering to its "representative of miners" status that harms the employer. These advantages are not permitted under the labor laws and MSHA's grant of them under the guise of mine safety shifts the organizing balance in the union's favor.

The presence of union organizers on the employer's premises necessarily means that some personal contact with employees will occur that otherwise would not have been available. The designation also means that the union organizers will have access to the employers' reports and documents—safety plans, records, safety training, etc.—and access to MSHA reports and documents concerning the mine otherwise unavailable. In addition, the union would have the right to request inspections, participate in pre- and post-inspection conferences, block modification of regulations, challenge MSHA enforcement actions and participate in Review Commission proceedings on behalf of mine employees. This access would provide the union with apparent credibility to speak with knowledge about the employer's mine practices. In sum, the designation would give the union organizing advantages in terms of access, personal contact and knowledge that would not be available under the labor laws, as well as enhanced credibility flowing from the appearance of government imprimatur.[17]

Accordingly, contrary to the Government's superficial contention, Petitioner's rights under the NLRA were irreparably threatened by MSHA's conduct, and the Mine Act procedures would not permit adequate and meaning-

[17] These advantages were not lost on the UMWA when it adopted the designation of miner's representative as an "organizing 'tool'" as part of its overall organizing strategy. *Kerr-McGee Coal Corp. v. Secretary of Labor*, 13 FMSHRC 1889, 1898 (ALJ 1991). Nor were they lost on the federal district court in this case when it specifically referenced them in finding irreparable injury as part of its grant of the preliminary injunction (Pet. App. 28).

ful review. Under *Mathews, McNary, Traynor,* and similar cases cited above, Petitioner's statutory and due process claims were properly before the federal district court for determination.

III. PETITIONER STATED A COGNIZABLE CLAIM.

The Government asserts that even if the district court were not precluded from exercising jurisdiction in this case, it was nevertheless required to dismiss the complaint because MSHA had not yet taken "final agency action," the claim is not ripe for review, and Petitioner has not exhausted its available administrative remedies (Br. 41-48). None of these contentions has merit.

1. As the Government concedes (Br. 42), Section 10 of the APA provides a cognizable cause of action for relief from "final agency action."[18] MSHA's UMWA Designation is clearly "agency action."[19] Further, the Government does not take issue with Petitioner's review of the precedent applying the "pragmatic" test of finality set forth in *Abbott* and other cases of this Court, relied on in Petitioner's opening brief (at 38).[20] Instead, the Gov-

[18] Repeating its confusion between pre-enforcement review and review of MSHA enforcement actions, the Government contends (Br. 42) that the Mine Act specifies an administrative review process which the APA requires be followed. For the reasons discussed *supra*, the review process in the Mine Act applies only to MSHA-initiated enforcement actions, and therefore is not applicable to the pre-enforcement review sought by Petitioner.

[19] The APA defines "agency action" specifically to include interpretations of existing regulations. 5 U.S.C. § 551(b). The fact that MSHA's interpretational ruling was communicated to Petitioner in a letter written by MSHA's District Manager (J.A. 49-50) does not make the determination any less "agency action" under the APA. *See Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 437 (D.C. Cir. 1986) (letter from EPA Division head speaking for agency constituted final agency action for pre-enforcement review). Indeed, the Government recognizes (Br. 42) that the agency action challenged here is MSHA's UMWA Designation itself, rather than merely the letter that reported the agency's decision.

[20] Under this well established precedent, an agency decision is considered final for purposes of review under the APA when the

ernment only argues that MSHA's UMWA Designation is not "final" because MSHA has not yet issued a citation to enforce the Designation and that MSHA's interpretational ruling is subject to review by the Review Commission and the courts (Br. 42-43).

Actual enforcement by an agency is not required before the agency decision is "final" under the APA. In *Abbott*, the FDA's labelling regulations were deemed final for pre-enforcement review even though the FDA had not yet sought to enforce the regulations.[21] Similarly, in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 586 (1980), the Court observed that agency action is "final" when it constitutes the agency's final word on the matter "short of enforcement action." Accordingly, the actual issuance of a citation by MSHA—initiating an enforcement proceeding to sanction a mine operator for failure to comply immediately with the UMWA Designation—was not a prerequisite for finality.

Likewise, review of MSHA's regulatory decision by the Review Commission and the courts is not a condition for finality. The UMWA Designation was MSHA's unequivocal, public, and definitive interpretation of its regulation (J.A. 49-50), and MSHA regulations provided no further avenue for modification or reconsideration within the agency of MSHA's position. The Review Commission is a separate agency—characterized by the Government (Br. 47) as an "independent" body—that reviews objections to enforcement actions; it does not participate in MSHA's internal decisions and, apart from its rulings on the issues presented in enforcement actions, the Review Commission

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agency publicly articulates an unequivocal position and expects regulated entities to alter their behavior to comply with the directive. *See Darby v. Cisneros*, —— U.S. ——, 61 U.S.L.W. 4679, 4682 n.10 (U.S. June 21, 1993) (agency action which is "finally operative and decisive is reviewable" under the APA). For the reasons set forth in Petitioner's opening brief (at 38), MSHA's interpretational ruling meets all of these requirements.

[21] To the same effect are *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407 (1942); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

cannot dictate MSHA policies. The fact that agency action is ultimately subject to independent judicial or quasi-judicial review does not impair its finality for purposes of the APA: that a court would ultimately review the FDA's regulations in an enforcement proceeding did not make the regulations non-final for purposes of pre-enforcement review in *Abbott*.[22]

2. MSHA's regulatory decision is also "ripe" for judicial review. *First*, contrary to the Government's contention (Br. 44), the underlying legal question raised by Petitioner's complaint—the statutory authority for MSHA's UMWA Designation and the statutory conflict with the NLRA—is no different from the challenges to the statutory authority for the FDA's labelling regulation in *Abbott*, and other cases. *See Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163 (1967) (petitioners framed a "purely legal issue" when they asserted that the challenged regulation was totally beyond the agency's power under the statute). For the reasons stated *supra* 11-12, the Review Commission's expertise on mine safety and health issues is simply not relevant to the purely legal question presented here.

Second, MSHA's UMWA Designation has the type of immediate and substantial impact on Petitioner that meets the second part of the ripeness test. *Reno v. Catholic Social Serv., Inc.*, —— U.S. ——, 61 U.S.L.W. at 4656 (applying the ripeness test delineated in *Abbott*). Here, MSHA made it clear that it expected Petitioner to comply immediately and post on the mine bulletin board its recognition of the UMWA as miners' representative and MSHA was prepared to follow up with an enforcement action

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[22] Pre-enforcement challenge to a MSHA Section 813(f) regulatory decision is, therefore, far different from challenging the internal administrative complaint and hearing by the Federal Trade Commission in *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-43 (1980), which held that an FTC administrative complaint was not "final action" in view of the fact that the agency itself would have an opportunity to review the matter again after the hearing before an ALJ and the court emphasized that the issuance of an FTC complaint does not require immediate compliance by the respondent.

(J.A. 48-50) that carried the probability of daily penalties for failing promptly to abate the cited violation, just as MSHA did in connection with the identical issue at the neighboring Kerr-McGee mine (J.A. 42-43).[23]

In arguing that the UMWA Designation would not impose a substantial burden on Petitioner, the Government (Br. 45) and the UMWA (Br. 16-17) fail to recognize the practical impact on Petitioner and its operations. As discussed at 10-15 above, Petitioner would be deprived of a legal right, required to affirm to its employees a recognition of the UMWA and forced into a dramatic deviation from Petitioner's ordinary business conduct. It gives to the union and its professional organizers an inherent advantage in seeking to unionize the mine—an advantage that thereby skews the delicate balance established in the NLRA—and thereby threatens significant change in Petitioner's business practices, perhaps even leading to a successful UMWA organizing campaign.[24]

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[23] In *Catholic Social Serv., Inc., supra*, the Court held that certain regulations were not ripe for judicial review because they merely limited access to a benefit (immigration status), did not impose sanctions for violation, and did not operate immediately and directly on certain of the claimants. Here, unlike *Catholic Social Serv.*, MSHA expected immediate compliance with its UMWA Designation and was prepared to enforce it with sanctions for non-compliance. These unassailable facts distinguish this case from *Catholic Social Serv.*, and place this case squarely on the *Abbott* "side of the line." 61 U.S.L.W. at 4656.

Toilet Goods Ass'n v. Gardner, supra, is also readily distinguishable. There, an FDA rule stated that the agency "may" under certain circumstances order an inspection of petitioners' facilities, and if access is refused, the agency "may" suspend further certification of color additives until the refusal is lifted (387 U.S. at 163). The Court, applying the standards set forth in *Abbott*, concluded that the regulation only stated possible agency action in the future and, therefore, was too remote from petitioner's everyday business affairs (387 U.S. at 164-65). Here, in contrast, there is no question that MSHA has applied its UMWA Designation directly to Petitioner, will demand compliance, and that compliance will directly affect Petitioner's conduct of its business.

[24] The UMWA's amicus brief suggests (Br. 16) that it may be difficult for UMWA employees to exercise the right they seek in

3. The short answer to the Government's claim (Br. 46-47) that Petitioner must further exhaust administrative remedies is that there are clearly none left to exhaust. The Government does not suggest that proceedings within MSHA are still available to change the UMWA Designation. The Government, continuing to confuse pre-enforcement review with MSHA-initiated enforcement actions, argues that Petitioner must first present its claims to the Review Commission before proceeding to court (Br. 47).

In *Darby v. Cisneros,* —— U.S. ——, 61 U.S.L.W. 4679 (U.S. June 21, 1993), the Court held that Section 10(c) of the APA required only exhaustion of statutorily-mandated "intra-agency" review, and that the courts were not free to require the exhaustion of optional appeals as well (61 U.S.L.W. at 4682). An adjudicatory proceeding before the Review Commission is plainly not intra-agency review, but, as the Government concedes, review by an "independent," "quasi-judicial agency" with "no enforcement responsibilities" (Br. 47). Further, Petitioner cannot exhaust the Review Commission remedy because, as discussed *supra*, mine operators have no right to initiate Review Commission proceedings to obtain a declaratory ruling on the lawfulness of MSHA regulatory decisions. Accordingly, because all intra-agency MSHA reviews have been completed, and no further proceedings outside of MSHA are required, the exhaustion requirement of Section 10(c) has been met. *Darby v. Cisneros, supra.*[25]

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participating in the MSHA inspections because inspections are unannounced and as non-employees they may not be present when inspections occur. But this disclaimer only demonstrates the real purpose of the union is not mine safety but rather to use the enhanced status of miners' representative and increased contact with miners from its activities as miners' representative to aid the UMWA in its ongoing organizing campaign. Indeed, as noted in n.17, the UMWA has for that reason included obtaining designations as miners' representatives as a vital "tool" in its organizing campaigns at Petitioner's and other mines.

[25] Contrary to the Government's alarmist arguments (Br. 20-21), pre-enforcement review will not impede the proper enforcement activities of MSHA or jeopardize mine safety. In rejecting the

CONCLUSION

The Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit should be reversed and remanded for consideration on the merits.

Respectfully submitted,

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Government's identical argument in *Abbott*, the Court declared that the district courts are fully capable of weighing the effect of preliminary injunctive relief on the public interest so that effective enforcement of the Food, Drug & Cosmetic Act would not be impaired (387 U.S. at 154-56). *See also Traynor v. Turnage*, 485 U.S. at 544 (refusing to assume that a multiplicity of suits will occur because of the availability of judicial review, and noting that the agency can seek the addition of preclusive language from Congress if necessary).

Moreover, the finality, ripeness and exhaustion doctrines will preclude pre-enforcement review in the "garden-variety" Mine Act case. In such cases, Congress has specified the mode of review of the agency's action through the Review Commission and the courts of appeals, thereby preventing diversion of enforcement actions to district court.